Datuk Chen Lip Keong & Anor v Datuk Mohd Fathi bin Haji Ahmad and another action

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS D1-22-1101-89 AND D3-22-1218-90
ABDUL MALEK J
1 DECEMBER 1993

Civil Procedure *— Trial — Two cases to be heard together — Who was to begin first in the circumstances — Test applicable*

Both cases to be heard together related to the same transactions and subject matter with the same parties with each party reversing their capacity in the other case. The issue to be decided before the trial began was who was to begin first in the circumstances.

Held, ordering the plaintiffs in the first case to begin first:
The proper test would be if one of the cases was pending without the existence of the other, who would begin first based on the pleadings of that particular case. Here, both plaintiffs had made assertions in their respective suits which required proof in the sense that the plaintiffs in both cases should give evidence before their respective defendants. Therefore, the plaintiffs in the first case should begin first as they were first in time as regards filing although filing first was not the sole crucial factor as to who should begin.

Per curiam:
A trial judge is empowered to decide as to which party was to begin despite an earlier ruling on the same point.

[Bahasa Malaysia summary

Kedua-dua kes yang hendak didengar bersama berkaitan dengan transaksi dan perkara yang sama dengan pihak yang sama dan setiap pihak menukar kedudukan mereka di dalam kes yang lain itu. Isu yang hendak diputuskan sebelum perbicaraan bermula adalah sama ada siapa yang sepatutnya bermula dahulu di dalam keadaan sedemikian.

Diputuskan, memerintahkan supaya plaintif di dalam kes pertama bermula dahulu:
Ujian yang patut digunakan adalah sama ada jika satu daripada kes itu belum selesai tanpa wujudnya kes yang lain itu, siapa yang akan bermula dahulu berdasarkan pliding kes itu. Di dalam kes ini, kedua-dua plaintif telah membuat penegasan di dalam guaman masing-masing yang perlu dibuktikan dengan plaintif di dalam kedua-dua kes memberi keterangan sebelum defendan masing-masing. Oleh itu, plaintif di dalam kes pertama sepatutnya bermula dahulu kerana mereka telah memfailkan tindakan mereka dahulu walaupun ini tidak

merupakan satu-satunya faktor yang amat penting mengenai siapa yang sepatutnya bermula. A

Per curiam:
Seseorang hakim perbicaraan diberi kuasa untuk memutuskan pihak mana yang sepatutnya bemula dahulu walaupun perkara yang sama telah diputuskan di dalam suatu penghakiman yang lebih awal.] B

[*Editorial Note*: The plaintiffs in the first case have appealed to the Supreme Court vide Civil Appeal No 02–689–93.]

G Sri Ram (*MS Murthi* with him) (*Sri Ram & Co*) for the plaintiffs. C
KS Narayanan (*Jasvinder Kaur* with him) (*KS Narayanan Associates*) for the defendant.

Abdul Malek J: Both these cases had been scheduled to be heard before me on 30 November 1993 but at the outset, learned counsel for the plaintiffs in Kuala Lumpur High Court Civil Suit No D1–22–1101–89 (hereinafter 'the first case') who was also appearing for the defendants in Kuala Lumpur High Court Civil Suit No D3–22–1218–90 (hereinafter 'the second case') had stated that the first issue to be decided before the trial began was who was to begin first in the circumstances. His view was that the other party should begin. Learned counsel for the plaintiff in the second case and the defendant in the first case had thought otherwise and had referred to the earlier order of VC George J, who was previously handling the matter, stating that the plaintiffs in the first case were to begin. Both counsel had eloquently enunciated the sequence of events pertaining to the two cases and had referred me to a number of case authorities. Having considered their able arguments, I had on the following day made the following order: D E F

(1) it is not disputed that both the cases to be heard together relate to the same transactions and subject matter between the same parties with each party reversing their capacity in one case in the other;
(2) the issue to be decided now is which party is to begin first for the purposes of trial; G
(3) on 11 January 1993, the judge in charge of the matter then, namely, VC George J, with all relevant counsel present, had decided on three issues, namely, that only these two cases would be heard together, that the plaintiffs in the first case should begin first and that all other related matters be stayed; H
(4) on 12 August 1993, I had decided on the first and third issues by agreeing with VC George J;
(5) arguments over the second issue, as to who should begin, despite the earlier ruling on 11 January 1993, had been made by both parties yesterday; I
(6) as to whether I can readjudicate on this issue again is not in question as both parties agree that since it was only an interlocutory order, I am not bound by it;

(7) the fact that all counsel present then had agreed to it is therefore of no consequence;

(8) it is therefore appropriate to state that a trial judge is empowered to decide as to which party is to begin despite the earlier ruling on the same point;

(9) it is unfortunate that there has been no judicial precedent for a situation similar to this where there are two cases to be heard together as the authorities cited only involve one suit and the question that arises is only as to whether the plaintiff or the defendant in that one suit is to begin first;

(10) accordingly, the proper test in our situation would be if one of the cases was pending without the existence of the other, who is to begin first based on the pleadings of that particular case;

(11) having considered the submissions and authorities and having painstakingly perused the pleadings in both cases in relation to the arguments, the substantive merits raised in the pleadings forming the overriding influence as to the decision on this matter, I am of the view that both plaintiffs have made assertions in their respective suits which require proof in the sense that the plaintiffs in both cases should give evidence before their respective defendants, and with the balance of the two cases on an even scale in that respect, I would order that the plaintiffs in the first case to begin first as they are first in time as regards filing although filing first is not the sole crucial factor as to who should begin;

(12) the fact that this decision tallies with the earlier decision made on the same matter on 11 January 1993 is purely coincidental;

(13) there will be no order as to costs.

On the application of learned counsel for the plaintiffs in the first case, and with no objections from learned counsel for the plaintiffs in the second case, I had granted him leave to appeal to the Supreme Court and, without the necessity of granting stay as applied for, had adjourned the matter to the next hearing dates in February 1994, which had been fixed earlier, on his undertaking that steps will be taken to have the appeal disposed of before the next hearing dates.

Order accordingly.

Reported by Jeanne Tan